



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Marketing & Management Information, Inc.

File: B-283399.2; B-283399.3

Date: November 30, 1999

Ira E. Hoffman, Esq., and Brian T. Scher, Esq., Grayson and Associates, for the protester.
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DIGEST

Protest challenging agency decision not to set aside procurement for small business concerns is sustained where decision was based on insufficient efforts to ascertain small business capability to perform the contract.

DECISION

Marketing & Management Information, Inc. (MMI) protests the decision of the Defense Commissary Agency (DeCA) to issue request for proposals (RFP) No. DECA01-99-R-0069, for subscription access to an information retrieval database, on an unrestricted basis. MMI, a small business, contends that the requirement should be set aside for small business concerns, and that the agency failed to undertake sufficient efforts to ascertain small business interest and capability to perform the contract.

We sustain the protest.

DeCA operates a worldwide system of commissaries for the resale of groceries and household supplies to military personnel and others. These commissaries are generally equipped with cash register equipment with front-end scanners, similar to those used in commercial grocery operations, to collect data on specific items sold, including information as to the quantity of each item sold, price, and total revenue from the sale. DeCA's commissary sales data is currently available to contractors that enter into a "subscription agreement" with DeCA for the purchase of a 3-year license (at an annual cost of \$700,000) for the use of the raw product movement data

collected by the commissaries' cash register scanner system. Under the subscription agreement, subscribers may use DeCA's commissary data (which the subscriber processes and places within its respective databases) to produce reports for manufacturers and suppliers of resale products which, for example, track product movement, demand, and prices; the subscriber, however, may not sell or release the actual data. Subscription Agreement ¶¶ 5, 6; Contracting Officer's Statement of Fact at 1.

Having recognized a need to track not only its own product movement, but also similar product movement and trends in the commercial sector, DeCA issued the current RFP for agency access to a single database that contains both DeCA and commercial grocery data which could be manipulated to meet the agency's information and reporting needs.¹ In this regard, the RFP's statement of work (SOW) provides for agency access to the contractor's information retrieval database containing the agency's product movement sales data for commissaries within the continental United States, as well as comparable sales/movement data from commercial grocery stores within the same geographical areas. RFP SOW at 4. The agency's access to the data would allow agency personnel to generate a variety of reports (for example, for market research on product movement, vendor presentation validations, marketing, support initiatives, and other business purposes) based upon specified parameters, such as geographical regions, products, markets, and time periods. Id.; Contracting Officer's Statement of Small Business Set-Aside Determination at 1.

DeCA issued the RFP on July 14, 1999, as an unrestricted acquisition. The RFP contemplated the award of a fixed-price contract for a base period (of approximately 1 year) with an 18-month option period. RFP at 1, 3, 20. MMI, a small business that currently has a contract with the agency for other DeCA commissary data requirements, filed a protest with our Office prior to the extended closing date for the receipt of initial proposals challenging the unrestricted nature of the procurement.² MMI, which asserts that the procurement should be set aside for

¹DeCA does not presently possess the capability to review and manipulate the raw product data currently provided under the subscription agreements. Contracting Officer's Statement of Fact at 1.

²MicroNEX, another small business interested in participating in the procurement, had earlier filed a protest with our Office based upon the agency's failure to provide sufficient time for proposal preparation. Upon receiving notification from the agency that DeCA had extended the closing date for receipt of proposals, we dismissed the protest as academic. MicroNEX, B-283399, Aug. 26, 1999, at 1. In that decision, we noted that, although MicroNEX had generally "questioned" the agency's decision not to set aside the procurement for small business concerns, the firm failed to provide sufficient support for its general challenge to consider it a valid basis of protest for review. Id. at 1-2.

small business concerns, contends that the agency failed to make sufficient efforts to solicit small businesses and to assess small business interest in and capability to perform the contract.

Contracting officers generally are required to set aside for small business all procurements exceeding \$100,000 if there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns. Federal Acquisition Regulation (FAR) § 19.502-2(b). Generally, we regard such a determination as a matter of business judgment within the contracting officer's discretion that we will not disturb absent a showing that it was unreasonable. Neal R. Gross & Co., Inc., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53 at 2. However, a contracting officer must make reasonable efforts to ascertain whether it is likely that offers will be received from at least two small businesses capable of performing the work. Safety Storage, Inc., B-280851, Oct. 29, 1998, 98-2 CPD ¶ 102 at 3. Our Office will review a protest to determine whether a contracting officer has made such efforts. Library Sys. & Servs./Internet Sys., Inc., B-244432, Oct. 16, 1991, 91-2 CPD ¶ 337 at 7. In this regard, we have found unreasonable the determination to issue a solicitation on an unrestricted basis where that determination is based upon outdated or incomplete information. McSwain & Assocs., Inc.; Shel-Ken Properties, Inc.; and Elaine Dunn Realty, B-271071 et al., May 20, 1996, 96-1 CPD ¶ 255 at 2-4.

In our view, the record here does not show that the contracting officer reasonably investigated whether the procurement should be set aside for exclusive small business participation. While the use of any particular method of assessing the availability of small businesses is not required, and measures such as prior procurement history, market surveys and/or advice from the agency's small business specialist and technical personnel may all constitute adequate grounds for a contracting officer's decision not to set aside a procurement, American Imaging Servs., Inc., B-246124.2, Feb. 13, 1992, 92-1 CPD ¶ 188 at 3, the assessment must be based on sufficient facts so as to establish its reasonableness. Safety Storage, Inc., supra. As discussed below, the record here shows that the agency's determination not to set aside the procurement was based upon incomplete information (regarding small business interest and capability) and unsupported assertions (regarding the ability of a small business to realize a profit under the contract in light of the substantial subscription costs for DeCA's data). Accordingly, we conclude that the agency failed to make sufficient efforts to ascertain small business capability to perform the contract, and we sustain the protest on that basis.

In determining whether to set the procurement aside for small businesses, the contracting officer considered the fact that only three firms--two large businesses and one small business, MMI--currently hold subscription agreements for DeCA's commissary data and that only these three firms have held subscriptions since the DeCA data subscription program started in 1996. Contracting Officer's Statement of Fact at 2. The contracting officer reports that DeCA contacted "all three current data providers regarding their capabilities in the area of database access." Id. During these conversations, he learned that only the two large business subscribers

“currently secure front-end sales and product movement data from civilian grocery stores throughout the United States.” Memorandum of Law at 2. The contracting officer also considered that the \$700,000 annual fee for access to the DeCA data would be a substantial “capital outlay” for any new subscriber, especially in light of the fact that the dollar amount of the contract to be awarded under the RFP was expected to be considerably less than the \$700,000 annual fee. Contracting Officer’s Statement of Fact at 2, 3. In this regard, the contracting officer states the following:

[T]his negative cash flow will require the successful contractor to be able to offset that cost through other means, e.g., the sale of reports based on the [data] to interested manufacturers and suppliers of resale products. Given that the commercial market is currently occupied by at least three other already established firms, it is difficult to believe that a new entry to the field, especially a small business concern, would be able to start anew and survive in such an environment.

Id. at 2.

Considering the above information, the contracting officer decided to issue the RFP on an unrestricted basis; the small business specialist concurred in that determination.³ Id. at 3.

MMI challenges the reasonableness of the contracting officer’s determination that there was no reasonable expectation of receiving offers from at least two responsible small businesses. In particular, MMI contends that the market research conducted by the agency was flawed and incomplete, since the agency’s inquiries as to industry capability did not extend beyond the three known subscribers to the DeCA data; MMI also contends that when it was contacted by DeCA, the agency’s inquiries did not involve the specific requirements of the current RFP. MMI contends that asking the two large businesses about potential competitors was an inadequate survey effort, since their responses that no other firms maintained the necessary commercial grocery data are incorrect and tainted by their self-interest in limiting the competition.

We agree with MMI that a survey of the three current subscribers provided incomplete information to support the contracting officer’s determination. The

³The requirement initially was to be synopsisized in the Commerce Business Daily on July 14, but the announcement was inadvertently eliminated from publication. In response to MicroNEX’s protest, DeCA readvertised the requirement on August 11. The agency reports that eight firms did express interest in the procurement as a result of the August announcement; the agency, however, does not report whether any of those firms are small business concerns, and, if so, whether the agency investigated their capability or included them in any subsequent market research efforts.

record shows that an important factor in the agency's determination to issue the RFP on an unrestricted basis was the contracting officer's belief, gained through communications with the subscribers, that only the two large businesses "currently secure . . . front-end sales and movement data from the civilian grocery chains on a nationwide basis." Contracting Officer's Statement of Fact at 1-2. As MMI points out, however, the RFP does not require commercial grocery data on a nationwide basis; rather, the required database is more limited in scope, since only "comparable sales/movement data from commercial grocery stores within the same geographical areas" as the DeCA commissaries is required. RFP SOW at 4. The RFP also did not require any firm to have the necessary databases in place prior to award. MMI, in response to the agency report, identifies several firms, including at least two other small business concerns, which operate in this industry and have access to, or could obtain, the requisite data; DeCA has not specifically challenged the capability of the firms identified by MMI. Since the RFP does not require a potential offeror to have a subscription for the DeCA commissary data or the comparable commercial data in place at the time of proposal submission, a market survey limited to the three current subscribers was insufficient to reasonably assess potential industry interest and capability to meet the agency's needs, particularly regarding small businesses.

Our review of the record further shows that, although the RFP identified the relevant Standard Industrial Classification (SIC) code for information retrieval services, no effort was made by the agency to research small business capability in the referenced industry. There is no evidence, for instance, of any request (by SIC code or otherwise) for potential source information from the Small Business Administration, and although source information could reasonably have been obtained through a request for information published in industry periodicals, or by holding a presolicitation conference to involve potential offerors in the acquisition, no such effort was made. Although, as stated above, no particular method of investigation is required by an agency in assessing small business presence and capability in an industry, we think the agency here was required to seek out more complete information than that which was obtained through limited communications with the current subscribers, and the contracting officer's own assumptions regarding small business capability or interest in the requirement.

As discussed above, the contracting officer also based his decision not to set the procurement aside for small business on the assumptions that a small business would not be able to realize a profit under the contract, since the annual subscription agreement fee of \$700,000 exceeds the expected dollar amount of the contract under the RFP, and that small business concerns would not be able to compete in this allegedly limited grocery data market, since three firms already provide this type of data. Our review of the record does not support the reasonableness of the contracting officer's speculation in this regard. In fact, MMI has provided evidence of the commercial demand for this type of grocery sales data. As MMI explains, the \$700,000 annual fee for a DeCA data subscription may be a viable investment for a firm desiring further participation in a potentially lucrative retail grocery sales data market. MMI asserts that the potential value of the

databases could be substantial, since manufacturers and suppliers rely on such data comparisons for their marketing and other business decisions, the value of which, in MMI's experience, could easily "dwarf" the subscription cost. MMI Comments, Oct. 12, 1999, at 6. In fact, MMI states that its earnings from sales of its data reports to grocery industry concerns have vastly exceeded its subscription fees. MMI Supplemental Comments, Oct. 21, 1999, at 3-4 n.5. The contracting officer has provided no evidence to support his position that there are no business opportunities for another competitor in this market or to rebut MMI's contentions to the contrary.

In support of its actions, the agency also relies upon the fact that the agency's small business specialist concurred with the determination to solicit proposals under the RFP on an unrestricted basis. The small business specialist's concurrence, however, was based upon the contracting officer's representations regarding the potential for receiving adequate competition. Those representations included the contracting officer's assertion that, based upon his understanding that MMI did not currently maintain comparable commercial grocery data, "the only sources which are expected to be able to provide what DeCA needs under this requirement are both Large Business concerns." Small Business Coordination Record, July 12, 1999, at 2. The contracting officer's representations to the small business specialist, as discussed above, were not based upon reasonable efforts on the part of DeCA to assess small business interest and capability. Consequently, the small business specialist's concurrence does not indicate that the agency acted reasonably in assessing whether there was a reasonable expectation of receiving sufficient small business participation to support a set-aside determination.⁴

We recommend that the contracting officer adequately investigate the potential small business capability and interest in the procurement and determine whether there is a reasonable expectation that offers will be obtained from two responsible small business concerns at fair market prices. If the contracting officer determines that

⁴MMI raises several other issues that we dismiss without review on the merits. For instance, the protester challenges the agency's failure to submit its agency-level protest to the Assistant Secretary of Defense; the protest instead was reviewed by the contracting officer. This protest contention is academic, however, in light of the protester's filing of the same matters with our Office for review. Next, although MMI raises various challenges for the first time in its report comments regarding the agency's sale of its commissary data, the requirements concerning DeCA's subscription agreement, and the propriety of the initial auction held for those agreements, these contentions are untimely, since they could have been, but were not, raised at the time of its initial protest to our Office. 4 C.F.R. § 21.2(a)(2) (1999). Finally, in its protest, MMI also contends that the RFP is ambiguous as to the number of awards to be made by the agency; however, since MMI failed to pursue the matter in its comments to the agency's report on the protest, we consider the issue abandoned. See The Big Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 CPD ¶ 218 at 5.

there is, he should cancel the RFP and reissue it as a set-aside for small businesses. We also recommend that MMI be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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